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IN THE INCOME TAX APPELLATE TRIBUNAL "J", BENCH MUMBAI

BEFORE SHRI MAHAVIR SINGH, VP
&
SHRI M.BALAGANESH, AM

ITA No.1449/Mum/2016
(**Assessment Year : 2011-12**)

&
SA No.462/Mum/2019
(Arising out of ITA No.1449/Mum/2016)
(**Assessment Year : 2011-12**)

Mahindra & Mahindra Limited, Corporation Taxation, P.K. Kurne Chowk, Worli, Mumbai – 400020	Vs.	Dy. Commissioner of Income-Tax Circle-2(2)(2) Aayakar Bhavan, M.K.Road, Mumbai-400020
PAN/GIR No.AAACM3025E		
(Appellant)	..	**(Respondent)**

ITA No.7382/Mum/2017
(**Assessment Year : 2013-14**)

&
SA No.461/Mum/2019
(Arising out of ITA No.7382/Mum/2017)
(**Assessment Year : 2013-14**)

Mahindra & Mahindra Limited, Corporation Taxation, P.K. Kurne Chowk, Worli, Mumbai – 400020	Vs.	Dy. Commissioner of Income-Tax Circle-2(2)(2) Aayakar Bhavan, M.K.Road, Mumbai-400020
PAN/GIR No.AAACM3025E		
(Appellant)	..	**(Respondent)**

ITA No.1797/Mum/2016
(**Assessment Year : 2011-12**)

Dy. Commissioner of Income-Tax Circle-2(2)(2) Aayakar Bhavan, M.K.Road, Mumbai-400020	Vs.	Mahindra & Mahindra Limited, Corporation Taxation, P.K. Kurne Chowk, Worli, Mumbai – 400020
PAN/GIR No.AAACM3025E		
(Appellant)	..	**(Respondent)**

ITA No.719/Mum/2017
(**Assessment Year : 2012-13**)

Mahindra & Mahindra Limited, Corporation Taxation, P.K. Kurne Chowk, Worli, Mumbai – 400020	Vs.	Asst. Commissioner of Income-Tax Circle-2(2)(2) Aayakar Bhavan, M.K.Road, Mumbai-400020
PAN/GIR No.AAACM3025E		
(Appellant)	..	**(Respondent)**

Assessee by	Shri H.P. Mahajani
Revenue by	Shri A. Mohan
Date of Hearing	**06/01/2020**
Date of Pronouncement	**19/ 06 /2020**

आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

ITA No.1449/Mum/2016 (**Assessment Year : 2011-12**)

This appeal in ITA No.1449/Mum/2016 for A.Y.2011-12 preferred by the assessee against the final assessment order passed by the

Assessing Officer dated 29/01/2016 u/s.143(3) r.w.s.144C(13) of the Income Tax Act, hereinafter referred to as Act, pursuant to the directions of the ld. Dispute Resolution Panel (DRP in short) u/s.144C(5) of the Act dated 18/12/2015 for the A.Y.2011-12.

SA No.462/Mum/2019 (**Assessment Year : 2011-12**)

This stay application is arising out of ITA No.1449/Mum/2016 for A.Y.2011-12.

ITA No.7382/Mum/2017 (**Assessment Year : 2013-14**)

This appeal in ITA No.7382/Mum/2017 for A.Y.2013-14 preferred by the assessee against the final assessment order passed by the Assessing Officer dated 30/11/2017 u/s.143(3) r.w.s.144C(13) of the Income Tax Act, hereinafter referred to as Act, pursuant to the directions of the ld. Dispute Resolution Panel (DRP in short) u/s.144C(5) of the Act dated 22/09/2017 for the A.Y.2013-14.

SA No.461/Mum/2019 (Assessment Year 2013-14)

This stay application is arising out of ITA No.7382/Mum/2017 for A.Y.2013-14.

ITA No.1797/Mum/2016(**Assessment Year : 2011-12**)

This appeal in ITA No.1797/Mum/2016 for A.Y.2011-12 preferred by the revenue against the final assessment order passed by the Assessing Officer dated 29/01/2016 u/s.143(3) r.w.s.144C(13) of the Income Tax Act, hereinafter referred to as Act, pursuant to the directions

of the ld. Dispute Resolution Panel (DRP in short) u/s.144C(5) of the Act dated 18/12/2015 for the A.Y.2011-12.

ITA No.719/Mum/2017 (**Assessment Year : 2012-13**)

This appeal in ITA No.719/Mum/2017 for A.Y.2012-13 preferred by the assessee against the final assessment order passed by the Assessing Officer dated 05/12/2016 u/s.143(3) r.w.s.144C(13) of the Income Tax Act, hereinafter referred to as Act, pursuant to the directions of the ld. Dispute Resolution Panel (DRP in short) u/s.144C(5) of the Act dated 29/09/2016 for the A.Y.2012-13.

With the mutual consent of both the parties, the appeal of the assessee in ITA No.7382/Mum/2017 for A.Y.2013-14 is taken up as the lead case and the decision rendered thereon would apply with equal force for other assessment years also in respect of identical issues except with variance in figures.

2. The concise ground No.1 raised by the assessee is with regard to treatment of expenditure in the sum of Rs.17,45,55,863/- incurred by the assessee as capital expenditure. The alternative prayer made by the assessee on without prejudice basis is that in case if said expenditure is construed as capital expenditure, then depreciation should be allowed to the assessee.

2.1. We have heard the rival submissions and perused the materials available on record. We find that assessee is engaged in the business of manufacturing and sale of on-road automobiles, agricultural tractor implements, engine parts and accessories of motor vehicle rendering services, property development activity, financing, investment and

transport solutions. We find that during the year under consideration, the assessee incurred expenses amounting to Rs.17,45,55,863/- in connection with various acquisitions made / explored by it as under:-

No	Particulars	Amount	Amount
A	Automotive Division - Marketing		
1	Legal Fees		
	Legal Fees for Project Strike (Acquisition of automobile company in North Europe)	87,41,491	
	Legal Fees for Project Bamford (Acquisition of automobile company in United Kingdom)	5,74,02,860	6,61,44,351
2)	**Professional fees**		
	Professional Fees -Project Strike (Acquisition of automobile company in North Europe)	28,80,399	
	Showroom Design charges (planning, designing layout plans for showroom/service centre)	30,000	29,10,399
3)	**Professional Fees-Project Maxwell, Project Bamford & Navistar Valuation**		
	Project Maxwell (Demerger of Mahindra Automobile Distributor Private Limited)	8,66,260	
	Project Bamford (Acquisition of automobile company in United Kingdom)	26,74,724	

	Navistar Valuation (For buying out stake in Navistar Inc.)	8,42,700	43,83,684
4)	Rates & Taxes -Competition commission of India Application for obtaining their approval for the buyout of Navistar shares in the 2JVs		10.00,000
5)	Year-end Provision for M&A Activities		
	Legal Fees / Professional Fees -Bamford (Acquisition of automobile company in United Kingdom)	2,57,09,756	
	Legal Fees for SYMC (In connection with further equity investment in SYMC)	44,38,800	
	Legal Fees / Professional Fees -Navistar (For buying out stake in Navistar Inc.)	42,71,600	3,44,20,156
B	Head Office		
	i) Legal fees		
	Project Moon (For strategic alliance of systech companies)	34,20,421	
	Project Vacation (In connection with sale of MHRIL)	7,00,000	
	Total Legal Fees	41,20,421	
	ii) Professional Fees		

	Project Moon (For strategic alliance of systech companies)	3,10,00,000	
	Project Amphere (Launch of electrically powered 2 Wheeler in the USA)	2,49,02,379	
	Project US Electric Vehicle (Launch of electrically powered 2 Wheeler in the USA)	15,18,952	
	Project Lotus (Restructuring of Mahindra Ugine Steel Company Limited)	23,63,155	
	Total Professional Fees	5,97,84,486	
	Head Office Total [B(i: + B(ii)]		6,39,04,907
C	MSB		
	Professional fees for Jaipur land (professional fees towards due diligence for title, documentation and liaison with local authorities, valuation report in connection with lease transaction of Jaipur land.)		17,92,366
	TOTAL		**17,45,55,863**

2.2. The assessee submitted in the course of expanding operation bars / manufacturing activities, it had incurred expenditure on acquiring entities which are engaged in similar business in India as well as overseas. For this purpose, it had incurred expenditure such as professional fees to legal charges, due diligence fees etc., and claimed the same as revenue in nature. The ld. AO treated the said incurrence of such expenditure as capital in nature on the ground that assessee had derived an enduring advantage by incurring that expenditure as it was meant for expansion of the business of the assessee. This action of the ld. AO upheld by the ld. DRP.

2.3. Aggrieved, the assessee is in appeal before us. We find that the ld. AR made the following submissions before us:-

(a) In so far as expenditure aggregating to Rs. 7,71,46,633 being expenditure incurred in connection with acquisitions, the issue is covered against the assessee vide order of the ITAT in ITA 1956/ Mum/ 2014 for AY 2009-10 (Page 8-10, Para 4 to 6) wherein, following order for A.Y. 2006-07 & 2007-08 the expenditure has been confirmed to be capital in nature. It has however been held that it should form part of cost of investment. Hence, disallowance of Rs. 7,71,16,633 would stand confirmed.

b) The second aspect of the ground concerns following expenditure aggregating to Rs. 9,74,09,230 :-

- Legal fees for Project Strike & Project Bamford - Rs. 6,61,44,351
- Professional Fees - Rs. 28,80,399
- Legal / Professional fees for Project Bamford - Rs. 2,83,84,48

This expenditure was incurred in respect of acquisitions which never materialized. It is the contention of the assessee that the said expenditure should be allowed as revenue expenditure since it has not resulted in the generation of any capital asset unlike the first set of expenditure which resulted in acquisition of investments and hence the expenditure incurred could be added to the cost of investments as directed by the Tribunal in AY 2009-10 and earlier years.

c) For this proposition reliance is placed on the following two decisions:-

(i) Commissioner of income tax v/s. M/s. Magnese Ore India Limited (Income tax Reference No. 150 of 1993). The relevant paras of the order are Para 8 in which facts have been set out. The expenses were incurred for setting up a

plant but which was never set up. The disputed expenditure was towards travelling expenses which was held by the Department to be capital in nature (para 14). In Para 20 the High Court has referred to the order of the SC in the case of Madras Auto Services (P) Ltd. (233 ITR 468) in which certain expenditure was held to be revenue in nature because no capital asset was generated by spending the amount in question. Concluding the issue in para 23 and applying the ratio in the case of Madras Auto (supra), the High Court held that the subject expenditure could not be directly related with the acquisition of any capital asset (because no capital asset resulted from the said expenditure).

In the assessee's case also, since no acquisitions actually happened, no capital asset resulted as a result of the expenditure and hence the expenditure was not capital in nature.

(ii) Further, in A.Y.1999-2000, in the assessee's own case, expenses of consultancy fees, preparation of plans, drawings and design for the setting-up of foundry was allowed by the Tribunal as business expenditure even though the foundry project was abandoned subsequently (ITA No 2344/Mum/200E), Page 3-5, para 2) . The Hon'ble Jurisdictional High Court dismissed the Department's appeal (ITA 450 of 2017) in Para 7 there against.

(iii) The ratio of that decision - expenditure which does not result in acquisition of a capital asset is not capital in nature - should be applied to the expenditure of Rs. 9,74,09,230 which did not result in acquisition of any entity/investment.

d) The last item of expenditure is Rs. 30,000 incurred towards showroom design charges which are routine expenses incurred in the course of business of the assessee and therefore should be allowed as revenue expenditure.

2.4. Per contra, the ld. DR vehemently relied on the order of the ld. AO.

2.5. We find that on perusal of the facts narrated hereinabove and by placing reliance on the various judicial precedents relied upon hereinabove in assessee's own case and in the case of other parties, we hold:

(a) A sum of Rs.771,46,633/- shall have to be treated as capital expenditure and shall form part of cost of investment which the assessee could claim as cost at the time of sale of investment.

(b) A sum of Rs.9,74,09,230/- represent expenditure incurred in respect of acquisitions which never materialised and hence, squarely allowable as revenue expenditure in as much as no capital asset came into existence of the assessee which would derive enduring benefit of the assessee.

2.6. Accordingly, the concise ground No.1 raised by the assessee is partly allowed.

3. The next issue to be decided in this appeal is with regard to allowability of deduction towards provision for warranties in the sum of Rs.50,11,63,331/-.

3.1. We have heard rival submissions and perused the materials available on record. We find from the undisputed facts narrated by the counsels at the time of hearing and on perusal of the records of the lower authorities that, the assessee whenever each and every vehicle / tractor is sold, the said sale is covered by warranty clause and the buyer is entitled to enforce this clause within specified period / mileage provided, the defects in vehicle / tractor noticed by the buyer are covered by the warranty. It was stated that the warranty period extends from six months to 30 months. Pursuant to this warranty clause, the assessee during the year

had made provision for warranty in the sum of Rs.50,11,63,331/- as under:-

(Rs. In lakhs)

Division	Provision for warranty for the year AY 2012-13	Provision for warranty for the year AY 2013-14	Incremental Provision for Warranty
Automotive Division	19,053.01	24,637.71	5,584.70
Tractor Division	6,341.93	5,727.76	-614.17
Swaraj Division	1,640.55	1,673.44	32.89
Defense	5.49	0	-5.49
Total	27,040.98	32,038.91	4,997.93

Incremental Provision	4,997.93
Add: Warranty taken over as per Scheme of Arrangement	14.00
Net Incremental Provision	5,011.93

3.2. The said provision for warranty expenses on vehicles / tractors sold during the year was stated to be ascertained by the assessee on the basis of actual expenses incurred on settlement of warranty schemes in earlier years. We find that the ld. AO had observed that there is no basis for the assumption that each and every vehicle sold by the assessee would suffer from same sort of defect during the warranty period and accordingly, the provision made for warranty schemes thereon would have to be treated as unascertained and uncrystallised liability, which was confirmed by the ld. DRP. The ld. DRP further held that the method adopted by the assessee for determining the provision for warranty scheme is skewed and cannot be termed as scientific.

3.3. We find that there is no dispute that the product sold by the company carry the warranty obligation, cost of which is already included /

embedded in the sale price. We find from the workings for provision of warranty submitted by the assessee before the lower authorities, that the said extensive workings duly demonstrate the scientific basis carried out by the assessee for making such provision. We further find that out of the available opening balance of provision for warranties, a sum of Rs.216.34 Crores had been settled / utilised during the year which worked out to 80% of the opening provision. We also find from the accounts of the assessee with regard to the provision for warranty, that the sum of Rs.30.56 Crores has been reversed towards provision by the assessee during the year. It is not in dispute that the sale of vehicles were carried out on a daily basis and incurrence of warranty expenditure thereon was also carried out on a daily basis. Hence, it could be safely concluded that the assessee making provision for warranty is done on a regular basis year on year in respect of vehicle/tractor sold during each year; such claims getting settled / utilised during each year as and when the warranty clause is enforced by the buyers pointing out specific defects contained in the warranty clause within the warranty period and wherever the existing provision already made requires reversal due to the fact that the claim is made beyond the warranty period or the claim is not covered within the warranty clause etc, the same is reversed. This scientific exercise of making provision for warranty clause for each and every vehicle / tractor sold is made on a regular basis year on year by the assessee which is duly proved in the extensive workings provided before the lower authorities and hence, we find that the issue is squarely covered by the decision of the Hon'ble Supreme Court in the case of Rotork Controls India Pvt. Ltd., vs CIT in 314 ITR 62. We also find that this issue has been allowed by the Tribunal in assessee's own case for the A.Y.1989-1990 to A.Y.1998-1999. Later in A.Y.2009-10, this issue was remitted back to the file of the ld. AO to decide the same in the light of the aforesaid Supreme Court decision. We find that the decision for

A.Y.2009-10 was rendered by this Tribunal by placing reliance on the decision rendered in assessee's own case for the A.Y.2006-07 to 2008-09. For A.Y.2006-07 to 2008-09, the ld. AR submitted that the ld. AO had duly accepted the fact that the provision for warranty schemes have been made based on the analysis of past data of actual warranty expenditure incurred but repeated the same disallowance on the reason that details of reversal of provision made in earlier years were not provided. The appeal against that order is pending. Meanwhile, against the order passed by this Tribunal for A.Y.1997-98 allowing the claim of warranty, the revenue had preferred the appeal to the Hon'ble Jurisdictional High Court and the same was dismissed in ITA No.901/11 dated 15/04/2014. Following this order of Hon'ble Jurisdictional High Court, the ld. AO himself had allowed the claim of the assessee for warranty in the scrutiny assessment proceedings framed in the hands of the assessee for the A.Y.2015-16 on 31/10/2019. In view of this, it could be safely concluded that there is no dispute with regard to the claim of deduction for provision for warranty based on scientific working and analysis made by the assessee and in order to avoid multiplicity of proceedings and especially in view of the fact that the issue is squarely covered by the decision of the Hon'ble Supreme Court and Hon'ble Jurisdictional High Court supra, we are inclined to allow the claim of provision for warranty in the sum of Rs.50,11,63,331/- at our end itself. Accordingly, the concise ground No.2 raised by the assessee is allowed.

4. The concise ground No.3 raised by the assessee is with regard to disallowance made u/s.14A of the Act.

4.1. We have heard rival submissions. We find that the assessee had claimed exempt income of Rs.39,21,13,994/-. We find that the assessee had disallowed a sum of Rs.20.94 Crores in the return of income which

was supported by workings filed along with return of income and was also filed during the assessment proceedings. The ld. AO ignored the said workings and resorted to make disallowance by applying the third limb of Rule 8D(2) of the Rules and arrive at the disallowance in the sum of Rs.39,21,14,000/- which was confirmed by the ld. DRP. At the time of hearing, both the parties before us fairly agreed that only those investments which had actually yielded exempt income during the year to the assessee are to be considered for the purpose of working out the disallowance made in the third limb of Rule 8D(2) of the Rules. This issue is now very well settled by the decision of the Hon'ble Supreme Court and accordingly, we direct the ld. AO to consider only those investments which had actually yielded exempt income during the year while working out the disallowance under third limb of Rule 8D(2) of the Rules. Accordingly, the concise ground No.3 raised by the assessee is partly allowed for statistical purposes.

5. The next issue to be decided in this appeal is with regard to transfer pricing adjustment made in respect of corporate guarantee fee of Rs.4,44,82,256/- by the ld. TPO.

5.1. We have heard rival submissions and perused the materials available on record. We find that the assessee had given guarantee / letter of consent to Mahindra Overseas Industries Company (Mauritius) Ltd., (MOICML in short), Mahindra USA Inc (MUSA) and Mahindra Forgings Europe AG (MFEA) to expand the business operations and achieve overall growth in the business of the assessee. MOICML needed funds to make equity investments in other group companies. MUSA and MFEA needed the loan for working capital and to augment the growth of the business operations. There was no cost incurred to provide corporate guarantee. We find that assessee had voluntarily disallowed 1% of the

corporate guarantee fee in the return of income. The ld. TPO determined the Arm's Length Price (ALP) of international transaction in respect of corporate guarantee fee at 3% which was upheld by the ld. DRP also. We find that the ld. AR fairly submitted that for the A.Y.2009-10, this Tribunal in assessee's own case had upheld the ALP adjustment of 3% towards corporate guarantee fee. The ld. AR also drew the attention of this Bench that the Hon'ble Jurisdictional High Court in several cases such as Everest Kanto Cylinder Ltd vs. ACIT ; Godrej Sara Lee Ltd., vs Addl. CIT; Nimbus Communications Ltd, Grabal Alok Impex Ltd had held that ALP of international transaction in respect of corporate guarantee fee would have to be determined at 0.50%. The ld. AR also submitted that in respect of fresh guarantees issued during the year, let the disallowance be restricted to 1% (i.e which was disallowed by the assessee voluntarily in the return of income) even though the aforesaid Jurisdictional High Court decisions had accepted 0.5% to be at arm's length. The ld. AR also submitted that in respect of the earlier decision rendered by this Tribunal for A.Y.2009-10 upholding the rate of 3% for corporate guarantee fee, the assessee had preferred an appeal before the Hon'ble Jurisdictional High Court and the same is pending disposal.

5.2. In view of the aforesaid facts, we deem it fit and direct the ld. AO as under:-

a) ALP of corporate guarantee fee in respect of old guarantees to be determined at 3% in line with the decision take by this Tribunal for A.Y.2009-10 as the matter is pending before the Hon'ble Jurisdictional High Court in assessee's own case ;

b) In respect of fresh guarantees issued during the year, the ALP of the same should be determined at 1%, being the same rate already disallowed by the assessee in the return of income, despite the aforesaid jurisdictional High Court decision holding the rate to be at 0.5%.

c) While recomputing this disallowance, it is needless to mention that the ld. AO should reduce the amount already disallowed towards guarantee fee by the assessee in the return of income.

Accordingly, the concise ground No.4A is partly allowed for statistical purposes.

6. The next issue to be decided is with regard to ALP adjustment made in respect of interest on loan to AE in the sum of Rs.2,40,63,705/-.

6.1. We have heard rival submissions and perused the materials available on record. We find that assessee company had given loans to Bristlecone UK Ltd., Mahindra Overseas Investment Company (Mauritius) Ltd, Mahindra Gears International Ltd, at the rate of 6%, 6.20-6.6%, 9% and 6.25%, as the case may be. The assessee company benchmarked the loans using LIBOR rate by using external Comparable Uncontrolled Price Method (CUP). The ld. TPO applied LIBOR for the year of loan and further added the average spread of comparable unsecured loans given in the said year and made ALP adjustment accordingly. We find that the ld. DRP directed the ld. AO to adopt LIBOR rate of the year in which the loan was given in case the loan had been granted at fixed rate for the entire tenure of the loan. However, if the loan had been granted for a floating / flexible rate of interest, the ld DRP directed the ld AO that LIBOR rate to be applied would be LIBOR for the year under consideration. The ld. DRP also directed the ld. AO to adopt the LIBOR as directed above and further add 5% towards basis points.

6.2. Aggrieved by this direction, the assessee is in appeal before us. The ld. DR submitted that let the ld. TPO be directed to adopt LIBOR + 300 basis points for benchmarking international transaction in respect of loan

given to AE. But we find that this Tribunal in assessee's own case for the A.Y.2009-10 in para 21 had specifically directed to consider only LIBOR rate at the relevant time and determined the ALP of the said transaction accordingly. Respectfully following the said judicial precedent, we direct the ld. AO accordingly. Accordingly, the concise ground No.4B raised by the assessee is partly allowed.

7. The next issue to be decided in this appeal is with regard to disallowance made u/.s.40(a)(ia) of the Act in respect of year end provisions amounting to Rs.33,78,54,976/-.

7.1. We have heard the rival submissions and perused the materials available on record. We find from the facts that the assessee makes year end provisions based on services rendered by various vendors/ professionals. These provisions represent cost of various activities carried out by the company during the relevant financial period. Since the company is following the mercantile system of accounting, it is required to account for such expenses even though the concerned parties have not submitted their bills or such bills are pending formal approval based on the internal system. Only after such formal approval, the bills of the vendor is recorded in the accounting system.

7.2. We find that the ld. AO had observed that the expenses are liable to TDS and are squarely covered by the provisions of Chapter XVII-B of the Income-tax Act, 1961. The assessee's contention that it is not crediting party account during the year which would have made the payments liable to TDS is not tenable on the ground that once the assessee is debiting profit and loss account, it automatically is crediting the party account based on matching principle. The accounting principles

cannot be left to the judgement of the assessee as to what entries it passes in his own books to suit its taxability or otherwise.

7.3. This action of the ld. AO was upheld by the ld. DRP. We find that this Tribunal in assessee's own case for the A.Y.2009-10 vide para 23 had deleted the disallowance made u/s.40(a)(ia) of the Act. The copy of the order was placed on record by the ld. AR. The ld. DR submitted that the assessee has not submitted the break-up of Rs.33.78 Crores being year end provision made for various expenses. But we find that the entire break-up had been duly submitted by the assessee before the lower authorities and the same are enclosed in page 234 of the paper book and the figures mentioned thereon are fairly ascertainable and are not mere adhoc provisions. Respectfully following the said decision of the Tribunal in assessee's own case for A.Y.2009-10, we have no hesitation in directing the ld. AO to delete the disallowance u/s. 40(a)(ia) in the sum of Rs.33,78,54,976/-. Accordingly, the concise ground No.5 raised by the assessee is allowed.

8. The next issue to be decided in this appeal is with regard to allowance of weighted deduction u/s.35(2AB) of the Act.

8.1. We have heard rival submissions and perused the materials available on record. We find that assessee has several research and development (R & D) units which were even approved by the Department of Scientific and Industrial Research (DSIR) for the purpose of claiming weighted deduction u/s.35 (2AB) of the Act as under:-

a) For the period 01/04/2011 to 31/03/2013 – Mahindra Research Valley Centre.
b) For the period 01/04/2010 to 31/03/2015

i) Kandivali R & D Service division

ii) Kandivali IDAM Centre

iii) Nashik Centre

8.2. We find that the gross amount of expenditure incurred in eligible R & D units during the year was Rs.1015.71 Crores. In the return of income, the assessee on conservative basis claimed deduction of Rs.844.32 Crores. In Form 3CL issued on 06/10/2015, a sum of Rs.950.91 Crores towards expenditure was approved by DSIR. The evidences in this regard are enclosed in pages 241-242 of the paper book filed before us. The ld. AR stated that though the assessee had claimed only Rs.844.32 Crores in the return of income, it is otherwise entitled for the additional sum of Rs.106.59 Crores (950.91 – 844.32) towards weighted deduction u/s. 35(2AB) of the Act in view of the fact that DSIR in form 3CL issued on 06/10/2015 has approved expenditure to the tune of Rs. 950.91 Crores.

8.3. The second aspect of this issue is that in respect of Swaraj R & D Complex, form 3CM was issued on 21/11/2017. We find that the form No.3CL issued by DSIR dated 06/10/2015 does not cover Swaraj R & D Complex expenditure in the sum of Rs.26.96 Crores. Since the amended form 3CL has not been issued, the ld. AO did not grant weighted deduction for the same. The ld. AR drew our attention that for A.Y.2006-07 to 2009-10 in assessee's own case, the claim of weighted deduction u/s.35(2AB) of the Act has been allowed by this Tribunal in full even in the absence of report in form No.3CL issued by DSIR.

8.4. Per contra, the ld. DR fairly agreed that let assessee be granted additional deduction of Rs.106.59 Crores towards the first aspect of this issue as in any case, the assessee is entitled for the same, being the amount approved by the DSIR. With regard to the second aspect of additional deduction of Rs.26.96 Crores in respect of Swaraj R & D

complex division, let assessee submit the amended form 3CL for the sum of Rs.26.96 Crores before the ld. AO and on verification of the same, let ld. AO be directed to grant deduction accordingly. The ld. AR fairly agreed to this argument of the ld. DR, accordingly, we direct the ld. AO as under:-

(a) To grant additional deduction of Rs.106.59 Crores u/s.35(2AB)

(b) The assessee to furnish amended form 3CL issued by DSIR in respect of Swaraj R & D complex and on verification of the same, the ld. AO is directed to decide the allowability for claim of deduction u/s.35(2AB) of the Act thereof.

The concise ground No.6 raised by the assessee is disposed off in the aforesaid manner.

9. The next issue to be decided is with regard to disallowance u/s.40(a)(ia) of the Act in respect of dealer incentives of Rs.386,85,00,000/-.

9.1. We have heard rival submissions and perused the materials available on record. We find that the limited issue involved herein is whether provisions of 194 H are applicable in respect of dealer incentives in the form of discounts / rebates paid by the assessee to the dealers on meeting certain criteria. We find that the assessee had contended that the transaction between the dealer and the assessee manufacturer is of a sale of the vehicle on a principal to principal basis, whereas the revenue had been holding that the dealers are agents of the assessee, who had rendered services in the course of buying and selling of goods. According to the revenue, since the dealer is merely an intermediary between the assessee and final customer, the provisions of Section 194H of the Act are applicable and since the assessee had failed to deduct the tax at source,

disallowance u/s.40(a)(ia) of the Act need to be made in respect of dealer incentive. The said action of the ld. AO was upheld by the ld. DRP. We find that this issue has been consistently decided in favour of the assessee by this Tribunal in its own case in various assessment years. We also find that in respect of assessment year 2008-09, the revenue had preferred an appeal before the Hon'ble Jurisdictional High Court against the order of this Tribunal and the same was dismissed by the Hon'ble Jurisdictional High Court in ITA No.1148/Mum/2014 dated 06/02/2017. We also find that the Hon'ble Supreme Court had even dismissed the Special Leave Petition (SLP) preferred by the Revenue against the order of Hon'ble Bombay High Court vide SLP No.37462/2017 dated 12/01/2018. In view of the same, the concise ground No.7 is hereby directed to be allowed.

10. The next issue to be decided in this appeal is with regard to treatment of industrial promotion subsidy incentive of Rs.45,36,95,084/- in the hands of the assessee for the purpose of taxability of the same.

10.1. We have heard rival submissions and perused the materials available on record. We find that in the return of income, the Company had claimed Rs. 45,36,95,084/- as capital receipt not chargeable to tax being Industrial Promotion Subsidy (IPS) receivable under incentive scheme 2001 announced by the Government of Maharashtra in respect of its manufacturing unit at Nashik. The said subsidy is payable under the 'Package Scheme of Incentives 2001 announced by the Government of Maharashtra for moving industries into certain backward areas of Maharashtra, in this case Nashik. The main objective of the Package Scheme 2001 was to intensify and accelerate the process of dispersal of industries to the less developed regions and promoting high tech industry in developed areas of the State of Maharashtra, coupled with the object

of generating mass employment opportunities. 2001 Scheme was a modification of the 1993 Scheme.

10.2. IPS is payable in respect of the new assembly line for XYLO vehicle started at its Nashik plant. The assessee receives IPS from the Directorate of Industries, Government of Maharashtra. It is restricted to 50% of the eligible fixed capital investment or the amount payable by way of Maharashtra Value Added Tax (MVAT) and Central Sales Tax (CST) in sale of finished goods, plus the amount of benefits by way of Electricity Duty exemption, exemption from payment of Stamp Duty, refund of royalty and any other benefits (as may be specified by the Government) availed by the eligible Mega Projects under PSI 2001 / 2007, whichever is lower. The copy of the said incentive scheme are enclosed in page 278 to 318 of the paper book filed before us. We find that assessee treated the amount of incentive received under Industrial Promotion Subsidy as capital receipt in the return of income on account of the following reasons:-

(a) The main objective of the Scheme was to ensure sustained industrial growth through innovative initiatives for development of key potential sectors and further improving the conducive industrial climate in the State, for providing the global competitive edge to the State's industry. The policy envisages grant of fiscal incentives to achieve higher and sustainable economic growth with emphasis on balanced regional development and employment generation through greater private and public investment in industrial development. In other words, the Scheme was meant to correct regional imbalance in the industrial development of the State and also achieve higher and sustainable economic growth.

(b) It is clear from the scheme that IPS incentive was granted not for carrying on day-to-day business of the unit more profitably but to ensure sustainable economic growth with emphasis on balanced regional development and employment generation. The Sales Tax Payment is only a measure or yardstick to determine the quantum of incentive.

10.3. We find that the ld. AO placed reliance on the decision of Hon'ble Supreme Court in the case of Sahney Steel and Press Ltd., reported in 228 ITR 253 and the decision of Hon'ble Punjab and Haryana High Court in the case of Abhishek Industries Ltd., reported in 286 ITR 1 and rejected the claim of the assessee of treating the industrial promotion subsidy as capital receipt.

10.4. The ld. AO also observed that this subsidy was available to the assessee from the date of commencement of commercial production suggesting that the subsidy was not given for the setting up of business but for carrying on of its business. He also observed that similar additions were made in assessee's own case for A.Yrs. 2008-09 to 2011-12. With these observations, the ld. AO treated the receipt of subsidy as the revenue receipt. This action was upheld by the ld. DRP. We find that the ld. AR before us submitted that the same Maharashtra 2001 package scheme of incentives has been examined by the Co-ordinate Bench of Delhi Tribunal in the case of LG Electronics India Pvt. Ltd., in ITA No.2163/Del/2015 dated 19/04/2017 wherein by placing reliance on the decision of the Hon'ble Supreme Court in the case of CIT vs. Ponni Sugars and Chemicals Ltd., reported in 306 ITR 392 had held that Industrial Promotion Subsidy received under Maharashtra 2001 package scheme of incentives to be capital receipt. The copy of the said Delhi Tribunal decision was placed on record by drawing specific reference to paras 4-7

thereof by the ld. AR. We are in agreement with the argument advanced by the ld. AR herein that the purpose for which subsidy was given under Maharashtra 2001 package scheme of incentives has been duly examined by the Delhi Tribunal and they had held that the purpose for which the subsidy was given is relevant and not the form in which it is given or the source from which it is given nor the time at which it is given, would be relevant for the purpose of determining the taxability of receipt of the said subsidy. We also find that this issue has been addressed in the following decisions of Hon'ble Supreme Court in favour of the assessee as under:-

(a) Chaphalkar Brothers, case reported in (2017) 88 Taxmann.com 178 (SC)

(b) Shree Balaji Alloys and others, case reported in (2017) 80 Taxmann.com 239 (SC)

10.5. Respectfully following the said decision, we hold that the subsidy in the sum of Rs.45,36,95,084/- is to be treated as capital receipt. Accordingly, the concise ground No.8 raised by the assessee is allowed.

11. The next issue to be decided in this appeal is with regard to treatment of industrial promotion subsidy incentive of Rs.119,85,01,118/- in the hands of the assessee.

11.1 We have heard rival submissions and perused the materials available on record. We find that assessee had claimed a sum of Rs.119,85,01,118/- for the industrial promotion subsidy incentive received on the basis of 'Package Scheme of incentive 2007 declared by Government of Maharashtra' for setting up of industry in certain backward areas (Chakan). The said incentive was given by Directorate of Industries for locating in a backward area and sales tax payment is only a measure

or yard stick to determine the quantum of incentive. We find that the main objective of the Scheme was to ensure sustained industrial growth through innovative initiatives for development of key potential sectors and further improving the conducive industrial, climate in the State, for providing the global competitive edge to the State's industry. The policy envisages grant of fiscal incentives to achieve higher and sustainable economic growth with emphasis on balanced regional development and employment generation through greater private and public investment in industrial development. In other words, the Scheme was meant to correct regional imbalance in the industrial development of the State and also achieve higher and sustainable economic growth. Under the eligibility for Mega project it specifies criteria of investment of more than Rs. 500 crores or generation of employment for more than 1000 persons in A&B area or investment more than Rs 250 crores or generating employment for more than 500 persons in rest of Maharashtra. It also provides that the Mega projects claiming the benefits based on employment criteria will have to employ the qualifying number of employees throughout the year and 75% of such employees should be local persons. Thus, the scheme has much larger purpose of industrial growth and therefore any incentive received in this regard is in the nature of capital receipt.

11.2. It is clear from the scheme that IPS (Industrial Promotion Subsidy) incentive was granted not for carrying on day-to-day business of the unit more profitably but to ensure sustainable economic growth with emphasis on balanced regional development and employment generation. The Sales Tax Payment is only a measure or yardstick to determine the quantum of incentive.

11.3 In this case the amount of subsidy is equal to 100% of the fixed capital investment or amount of MVAT payable on sale of finished

products. We find that the ld. AO sought to treat the said receipt of the subsidy as the revenue receipt on the ground that the said subsidy has been given for carrying on the business of the assessee and also on the ground that the same was given after the date of commencement of commercial production. This action of the ld. AO was upheld by the ld. DRP. We find that the same subsidy scheme had been adjudicated by the co-ordinate Bench of this Tribunal in assessee's subsidiary company's case i.e. Mahindra Vehicle Manufacturers Ltd., in ITA No.6919 & 6920/Mum/2016 dated 28/11/2018 wherein the receipt of subsidy had been held to be capital receipt as the same had been held to be capital receipt as the same had been granted for either setting up new unit or for expanding the existing unit in certain regions of the State. It was further held that the subsidy was granted in the form of sales tax payable on finished goods and spares sold by the assessee. This Tribunal decision was rendered by duly considering the decision of Hon'ble Supreme Court in the case of Ponni Sugars and Chemicals Ltd., reported in 306 ITR 392. Respectfully following the same, we direct the ld. AO to treat the receipt of industrial promotion subsidy incentive of Rs.119,85,01,118/- under the 2007 incentive scheme as capital receipt. Accordingly, the concise ground No.9 raised by the assessee is allowed.

12. The next issue to be decided in this appeal is with regard to disallowance of deduction of difference in exchange rate of Rs.119,37,27,592/-.

12.1. We have heard rival submissions and perused the material available on record. We find at the outset that the difference in exchange rate arises out of the repayment of foreign currency loans / valuation of foreign currency loans as on 31/03/2013 amounting to Rs.119,37,27,592/- which was claimed as revenue expenditure by the

assessee in the return of income. The basis of arriving at this exchange rate difference is enclosed in page 407 of the paper book filed before us. We find that assessee company had taken foreign currency loans from HSBC , Bank of America, Sumitomo Mitsui banking Corporation, SBI - Hongkong, Mizho Corporate bank for acquisition of capital assets and working capital purposes.

12.2. The Company has also given Inter Corporate Deposits (ICD's) to Bristlecone Limited, Mahindra Overseas Investment Company (Mauritius) Limited and Mahindra Gears International Limited for general purposes.

12.3. As on 31.3.2013, in the books of account the Company has revalued the loan liabilities and ICD's given and part of the loss arising thereon due to difference in exchange of Rs. 63,02,52,539/- to the Fixed assets / Capital work- in-progress(CWIP) and balance of Rs. 56,34,75,052/- is carried forward in the 'Foreign Currency Monetary Item Translation Difference Account' as per the clarification issued in Accounting Standard (AS) 11 by The Institute of Chartered Accountants of India (ICAI).

12.4. In the books of account, to the extent foreign currency loans were utilized for acquisition of fixed assets in India, exchange difference was capitalized as part of cost of fixed assets/CWIP. To the extent the foreign currency loans were utilized for acquiring other monetary items (basically Investments in foreign companies) the difference in exchange was debited to an account called 'Foreign Currency Monetary Items Translation Difference Account ' (FCMITDA).

12.5. Up to AY 2008-09, both these exchange differences were-debited/credit to the Profit and Loss Account and were allowed/taxed accordingly in scrutiny assessment proceedings.

12.6. On March 31 2009 (relevant to A.Y.2009-10), the Ministry of Company Affairs issued a notification amending Accounting Standard 11 dealing with Accounting treatment for Effects of changes in foreign exchange rates.

12.7. Based on the notification, instead of debiting the profit and loss account with the amount of exchange loss, the Company has charged the amount of difference in exchange to the

(i) fixed assets,

(ii) capital work-in-progress and

(iii) has carried forward certain amount in the 'Foreign Currency Monetary item Translation Difference Account' to be written-off to the profit & loss account in later years.

12.8. The exchange loss debited to 'Foreign Currency Monetary Item Translation Difference Account' is written-off to the profit & loss account over the life of the corresponding foreign currency loans.

12.9 Section 43A of the Income Tax Act, 1961 deals with exchange difference arising on repayment of liabilities incurred for the purpose of acquiring fixed assets outside India. Since there is no specific provision dealing with adjustment based on foreign exchange fluctuation for assets acquired locally in India, the Company has claimed the Difference in Exchange of Rs. 63,02,52,539/- to the Fixed assets / Capital work- in-progress and Rs. 56,34,75,052/- carried forward in the 'Foreign Currency

Monetary Item Translation Difference Account' as deductible revenue expenditure.

12.10. We find that the ld. AO had disallowed the aforesaid exchange fluctuation loss as notional and contingent and also capital in nature and accordingly, disallowed the same in the assessment which was upheld by the ld. DRP before us. The ld. DR stated that this issue is covered against the assessee by the order of this Tribunal for A.Y.2009-10 in assessee's own case and drew the attention of the Bench to the relevant portion of the order.

12.11. Per contra, the ld. AR stated that this Tribunal while rendering the decision for A.Y.2009-10 had not considered the principles laid down by the Hon'ble Apex Court in the case of CIT vs. Woodward Governor India Ltd., reported in 312 ITR 254 (SC). Further he stated that the foreign exchange gain or loss incurred on acquisition of capital asset had to be adjusted with the cost of capital assets. The ld. AR fairly stated that this decision of the Tribunal covers the claim of Rs.63,02,52,539 being exchange loss relatable to fixed assets / capital work in progress for which atleast depreciation should be granted to the assessee in any case. He further stated that in the year under appeal, the issue that require adjudication is loss referable to other monetary items debited to "Foreign Currency Monetary Item Translation Difference Account (FCMITA) and depreciation on loss that the Tribunal had held to be adjusted to the cost of capital assets. He further stated that these two issues were not part of adjudication by this Tribunal for A.Y.2009-10.

12.12. We have gone through the order of the Tribunal for A.Y.2009-10 and we find force in the argument advanced by the ld. AR in this regard. We find that this Tribunal had held that the exchange loss need to be

adjusted to the cost of fixed assets / cost of capital work in progress. Hence, we hold that assessee is entitled for depreciation on such capital portion of the exchange fluctuation loss.

12.13. The another related issue involved in this regard is what is the period for which such loss should be capitalised. In this regard, the ld. AR argued that under the Income Tax Act, any item that is added to the fixed asset need to be capitalised till the asset is put to use. This is supported by Explanation 8 to Section 43(1) and proviso to Section 36(1)(iii) of the Act. Any cost incurred beyond that period should be charged off as revenue expenditure. Accordingly, he argued that irrespective of the accounting treatment given by the assessee in the books, the exchange loss could be added to the cost of fixed assets only till such time, the assets were not put to use. Thereafter, such exchange loss should be allowed as revenue expenditure. We find that this line of argument was not taken up by the assessee for A.Y.2009-10 while addressing this issue before the Tribunal for A.Y.2009-10. Accordingly, there was no occasion for this Tribunal to adjudicate this aspect of the issue. The ld AR submitted that this exchange loss that is debited to FCMITA is not related to acquire fixed assets and hence, the same should be allowed as revenue expenditure. The ld. AR further stated that, in any event, the process of capitalisation of such exchange loss should end with the commencement of overseas investments utilizing foreign currency loans. Exchange loss for the period after acquisition of investments and therefore, be allowed as revenue expenditure according to the ld. AR. We find that the decision taken by this Tribunal in A.Y.2009-10 may not be fully applicable to the facts of the instant case and we hold that the said decision would hold good with some modifications as suggested below based on factual developments that had happened later:-

(a) Foreign currency loans utilised for acquiring fixed assets and overseas investments is to be capitalised and correspondingly depreciation need to be granted to the assessee. In this, the exchange loss pertaining to the period till the asset was put to use should alone be capitalised and thereafter, the same should be allowed as revenue expenditure.

(b) Foreign exchange loss attributable to other monetary items debited to FCMITA as per AS 11 of ICAI should be allowed as revenue expenditure.

Accordingly, the concise ground No.10 raised by the assessee is disposed off in the aforesaid manner.

13. The next issue to be decided in this appeal is with regard to the allowability of expenses on Employees Stock Options (ESOP) amounting to Rs.47,03,67,525/-.

13.1. We have heard rival submissions and perused the materials available on record. We find that during the Financial Year 2012-13 pertaining to assessment year 2013-14, the company has claimed deduction towards ESOP expenditure of Rs. 47,03,67,525/- on the basis of options exercised. Options granted under ESOP scheme vest in 5 equal installments from date of the grant. During the year under consideration, options exercised was for 6,46,308 shares out of options granted on 28th January, 2011 and 14th December, 2011. The exercise price of options granted on 28th January 2011 and 14th December 2011 was Rs. 5/- per share and market price per share was Rs. 733.05 on 28th January, 2011 and 729.90 on 14th December 2011. ESOP cost working for the year under consideration is as under:

Sr No	Grant Date (A)	Market price on grant date (B)	Exercise Price (C)	No of options exercised (D)	**ESOP cost [(B-C)*d]**
1	**28.01.2011**	**733.05**	**5**	**590,113**	**42,96,31,770**
2	**14.12.2011**	**729.90**	**5**	**56,195**	**4,07,35.755**
	Total			**646,308**	**47,03,67,525**

13.2. This sum of Rs.47,03,67,525/- was claimed as deduction by the assessee in the return of income, which was sought to be disallowed by the ld. AO in the assessment on the ground that the said expenditure was incurred for increasing share capital of the assessee company. The ld. AO also observed that employees stock option will give enduring benefit to the assessee company from the employees who have availed the scheme. The ld. AO by placing reliance on the decision of Hon'ble Supreme Court in the case of Punjab State Industrial Development Corporation Ltd., reported in 225 ITR 792 and Brooke Bond India Ltd., reported in 225 ITR 798 held that the said expenditure would be capital in nature. This action was upheld by the ld. DRP. We find that this issue is now settled by the Special Bench of the Bangalore Tribunal in the case of Biocon Ltd., in favour of the assessee, wherein it has been held that the deduction is to be allowed for the difference between the exercise price of the option and the market price at the time of exercise of the option. We find that in the return of income, the assessee had claimed deduction for the difference between the exercise price and the market price on the date of grant of option. This Tribunal while rendering the decision for the A.Y.2009-10 in assessee's own case had restored this issue to the file of the ld. AO to consider the claim of deduction in the light of the Special Bench decision in the case of Biocon Ltd., We find that the ld. AR fairly submitted that in

principle, this issue is decided in favour of the assessee by the Special Bench in the case of Biocon Ltd., but still in the interest of justice, a specific direction need to be given to the ld. AO to allow deduction in respect of all options exercised during the year equal to the difference between the exercise price and the market price at the time of exercise of the option, as held in the case of Biocon Ltd, instead of the market price at the time of grant of option. We find lot of force in the said argument of the ld. AR and direct the ld. AO accordingly. Accordingly, the concise ground No.11 raised by the assessee is allowed for statistical purposes.

14. The next issue to be decided in this appeal is with regard to deduction of provision for post retirement scheme for housing in the sum of Rs.751,45,000/- and for post retirement medical schemes in the sum of Rs.206,30,000/-.

14.1. We have heard rival submissions and perused the material available on record. We find that during the year under review, the company has claimed deduction for Rs. 751.45 Lakhs towards provision for liability under its Post - Retirement scheme. The liability was quantified based on actuarial valuation. The scheme titled as 'Post Retirement Scheme' is in respect of select cadre of employees who meet certain criteria at the time of retirement from the company and thereafter. The benefit is payable to those employees who have completed at least 10 years of service with the company and 5 years of service in Group Management Board. This is the incentive given to key employees and the purpose is that they should not leave employment and after retirement they should not join the competitors.

14.2. The company made provision for the amounts that would be payable under the post-retirement scheme to the present employees in relation to services rendered in the year under assessment. The provision was made to retain pool of talent and to prevent them from moving to competitors. We find that the assessee had submitted that the liability in respect thereof had been scientifically determined based on actuarial valuation of the same as at the end of the each year. The Copy of the said actuarial valuation report is enclosed in pages 413-427 of the paper book filed before us. It was vehemently stated before the lower authorities that, the liability had indeed arisen during the current year and the said scheme has been formulated wholly and exclusively for the purpose of the business of the company, the said sum of Rs.751.45 lakhs should be allowed as business expenditure. The ld. AO, however, disallowed the claim holding it to be a mere provision and contingent in nature. Further, he observed that this benefit will be given to retiring employees and not working employees and hence, not allowed as business expenditure.

14.3. Similarly, with regard to provision made for post-retirement medical scheme in the sum of Rs.206.30 lakhs, the ld. AO disallowed the same on the same ground that it is a mere provision and contingent in nature and that the benefit will be given to retiring employees and not to working employees. The copy of the said actuarial valuation report for post retirement medical benefits is enclosed in pages 429-445 of the paper book filed before us.

14.4. We find that the issue under dispute is squarely covered in favour of the assessee by the coordinate bench decision of this Tribunal in the case of Hindustan Petroleum Corporation Ltd., in ITA No.1294/Mum/2011 vs. JCIT dated 26/09/2012. We have gone through the said Tribunal

order and find that this issue is squarely decided in favour of the assessee on similar facts and circumstances. We also find that assessee had filed a modified ground of appeal before us on 'without prejudice basis' that in any case, at least the actual payment made during the year towards post retirement scheme for housing and post retirement medical benefit should be allowed as deduction. We find that assessee is indeed entitled for deduction on provision basis itself and hence, it is not required to adjudicate the modified ground of appeal filed before us and the ld. AO is hereby directed to grant deduction for provision for post retirement scheme for housing in the sum of Rs.7,51,45,000/- and post retirement medical scheme in the sum of Rs.2,06,30,000/- while giving effect to this order. Accordingly, the concise ground No.12 raised by the assessee is allowed.

15. The next issue to be decided in this appeal is with regard to scheme of reduction for legal fees recovered but disallowed on gross basis amounting to Rs.3,33,56,000/-.

15.1. We have heard rival submissions and perused the materials available on record. During the year under review, the Company had disallowed Rs. 49,14,02,000 as capital expenditure debited to Profit & Loss A/c as reflected in the Tax Audit Report.

15.2. One of the items in the list of expenditure was payment of Rs. 5,74,02,860 towards legal charges in connection with Project Bamford. While preparing the annexure for "Capital expenditure debited to Profit & Loss A/c only the expenditure side was scrutinized and the expenses in connection with Project Bamford were captured and aggregated to Rs.5,74,02,860. However, out of the said expenses, Rs. 3,33,56,000 have been recovered from Aston Martin Holdings Limited.

15.3. Thus the net expenditure which ought to have been held to capital in nature was as under:

Gross expenditure on Project Bamford	Rs. 5,74,02,860
Less : Recovery	Rs 3.33.56.000
Net that could have been disallowed	Rs. 2,40,46,860

15.4. We find that the ld. AO had rejected aforesaid claim of the assessee seeking reduction from total income a sum of Rs.3,33,56,000/- on the pretext that the said claim was not made by the assessee company in the return of income. The ld. AO in this regard placed reliance on the decision of the Hon'ble Supreme Court in the case of Goetze India Ltd., reported in 284 ITR 323. This action of the ld. AO was upheld by the ld. DRP. We find that the claim of the assessee deserves to be accepted in view of the narration of the aforesaid facts which remain undisputed. In any case, the decision of Hon'ble Supreme Court in Goetze India Ltd., in 284 ITR 323 does not apply to appellate authorities especially the Tribunal, which fact is clearly mentioned in the last paragraph of the said decision. It is not the case of the revenue that the claim made by the assessee herein to reduce the same and Rs.3,33,56,000/- is ingenuine. We would like to place reliance on the decision of the Hon'ble Jurisdictional High Court in the case of Pruthvi Brokers and Shareholders Pvt. Ltd., reported in 349 ITR 336 (Bom) and accordingly, entertain the claim of the assessee and direct the ld. AO to reduce a sum of Rs.3,33,56,000/- from the total income while giving effect to this order. Accordingly, the concise ground No.13 raised by the assessee is allowed.

16. The next issue to be decided in this appeal is with regard to taxability of interest income on tax free bonds amounting to Rs.529,12,192/-.

16.1. We have heard rival submissions and perused the materials available on record. During the year under review, the company has offered to tax interest on long term and current investments amounting to Rs. 39,48.03,120 under the head 'income from other sources'.

16.2. Out of the above amount, Rs. 6,33,76,065/- relates to interest on current investments (as per clause 22(a)(ii) of Annual Accounts). This includes interest on tax free bonds amounting to Rs. 5,29,12,192/- which was wrongly offered to tax. Therefore, interest of Rs. 5,29,12,192/- should be excluded from interest income i.e. from 'income from other sources', while computing total income of the assessee.

16.3. We find that the ld. AO had rejected the aforesaid claim of the assessee on the ground that the said claim of exemption was not made by the assessee in the return of income. In support of this proposition, the ld. AO placed reliance on the decision of Hon'ble Supreme Court in the case of Goetze India Ltd., reported in 284 ITR 323. This action of the ld. AO was upheld by the ld. DRP. We find that there is absolutely no dispute that a sum of Rs. 5,29,12,192/- representing interest income from tax free bonds was duly offered to tax by the assessee in the return of income. It is not in dispute that the said interest income is not liable for taxation. Merely, because the assessee had erroneously offered a particular sum for taxation, the revenue cannot take advantage of the ignorance of the assessee and bring to tax a receipt which is outside the ambit of definition of 'income' under the Act. We find that the decision of Hon'ble Supreme Court in the case of Goetze India Ltd., does not apply to appellate authorities especially the Tribunal, which fact is clearly mentioned in the last paragraph of the said decision. We would like to place reliance on the decision of the Hon'ble Jurisdictional High Court in the case of Pruthvi Brokers and Shareholders Pvt. Ltd., reported in 349

ITR 336 (Bom) and accordingly, entertain the claim of the assessee and direct the ld. AO to exclude from the total income a sum of Rs.5,29,12,192/- towards interest on tax free bonds by granting exemption for the same while giving effect to this order. Accordingly, the concise ground No.14 raised by the assessee is allowed.

17. The next issue to be decided in this appeal is with regard to capital gains on sale of land amounting to Rs.270,37,500/-.

17.1. Brief facts of this issue are that during the year under review, the company has sold land at Pune & Goa and shown capital gain of Rs. 6,29,47,157 as under:-

Details of Land	**Actual Sale vale**	**Indexed cost of acquisition**	**Long term capital gains**
LAND AT BICHOLIM MOITEM, GOA 1,89,130 SQ.MTS	8.28.00.000	2,48,57,432	5,79,42.568
LAND AT WAGHOLI PUNE GAT NO 2358 0 HEC.75ARES	1,20,00,000	1,01,68,830	18,31.170
LAND AT PUNE WAGHOLI GAT NO. 2360 O.HEC 82 ARES	1,30,00,000	1,11,18,201	18,81,799
GAT NO.2359 PUNE WAGHOLI LAND 44.12 ARES	70,00,000	57,08,380	12,91,620
Total	11,48,00,000	5.18.52,843	6,29,47,157

18.1. The ld. AO adopted the valuation determined by the Stamp Valuation Authority and observed that the sale is higher than the sale

consideration received by the assessee and accordingly computed the capital gains in terms of Section 50C of the Act. The ld. DRP directed the ld. AO to refer the issue to the Departmental Valuation Officer and recompute the capital gains in terms of Section 50C(2) of the Act.

17.2. Before us, the ld. AR accepted to the fact of determination of value in terms of Section 50C(2) of the Act and pleaded that the report of the Departmental Valuation Officer (DVO) in respect of subject mentioned properties were received after the order of the ld. DRP and hence, he pleaded that let these DVO reports be examined by the ld. AO and let AO recompute the capital gains in terms of Section 50C(2) of the Act. The ld. DR fairly agreed that this argument of the ld. AR.

17.3. We have heard rival submissions and perused the materials available on record. We find that the ld. AR made elaborate arguments disputing the valuation report given by the DVO by suggesting various reasons. He also pleaded that any variation in full value of consideration between the DVO report and the actual sale consideration cannot be automatically treated as income and tolerance limit of 5% to 10% range should be granted to the assessee. We find that valuation report of DVO had been received after the order of ld. DRP and hence, the ld. AO did not have the benefit of the said DVO report either while framing the assessment or while giving the effect to the order of ld. DRP. Hence, in the interest of justice and fair play, we deem it fit and appropriate to remand this issue to the file of the ld. AO with a direction to recompute the capital gains on sale of land in terms of Section 50C(2) of the Act based on the reports obtained from DVO in respect of the subject mentioned properties. The assessee is at liberty to make all arguments including seeking relief of the tolerance limit of 5% to 10% variation in sale consideratiuon vis-à-vis the consideration fixed by the Stamp

Valuation Authority or consideration adopted by the DVO. We are not giving any opinion with regard to allowability of the tolerance limit of 5% to 10% range variation in this order. Accordingly, the concise ground No.15 is disposed off in the aforesaid manner.

18. The concise ground Nos.16A and 16B were stated to be not pressed by the ld. AR at the time of hearing. The same is reckoned as statement made from the Bar and accordingly, the concise ground Nos . 16A and 16B are dismissed as not pressed.

19. The next issue to be decided in this appeal is with regard to deduction u/s.80IC of the Act in respect of Rudrapur unit of the assessee.

19.1. The brief facts of this issue are that the assessee claimed deduction u/s.80IC of the Act in respect of Rudrapur unit for Rs.135,35,79,000/-, which was restricted by the ld. AO to Rs.57,01,61,441/-. The ld. AO in principle accepted the fact that assessee is entitled for deduction u/s.80IC of the Act in respect of profits derived from Rudrapur unit of the assessee. The ld. AO allowed deduction u/s.80IC of the Act by applying the following formula:-

$$\frac{\text{Total business of the company x Rudrapur unit turn over}}{\text{Total turn over}}$$

19.2. This formula was adopted by placing reliance on the order of the ld. DRP for A.Y.2009-10 and 2012-13. This action was upheld by the ld. DRP.

19.3. The ld. AR before us argued that there is absolutely no finding given by the lower authorities during the year under appeal that facts of this year i.e. A.Y.2013-14 are similar to those in A.Y.2009-10. Hence, the ld. AR argued that the lower authorities grossly erred in following the DRP order of A.Y.2009-10 mechanically. He further drew our attention to

the fact that the transactions related to Rudrapur unit were recorded as "Specified Domestic Transaction" (SDT) in terms of Section 92BA(v) of the Act and accordingly those transactions were duly subjected to transfer pricing assessment and were part of audit report in form 3CEB filed by the assessee. He specifically submitted that the transactions relating to Rudrapur Unit included purchase and sale of raw materials and consumables and also payment of expenses. With regard to the total transactions of Rudrapur unit, he drew our attention to the transfer pricing study report enclosed in pages 552 to 562 of the paper book filed before us. He stated that for benchmarking the purchase and sales transactions of Rudrapur unit, Internal Transactional Net Margin Method (TNMM) was adopted by due comparison with noneligible Nagpur unit. He further submitted that the Profit Level Indicator (OP/OR) of eligible Rudrapur unit was worked out at 22.55% and that of Nagpur unit at 21.28%. These details are available in page 558 of the paper book filed before us. He further submitted that for allocation of R & D expenses, head office expenses and distribution expenses, interest cost and other allocations, "other method" was utilized to demonstrate the arm's length price (ALP). These workings are available in pages 561 to 562 of the paper book filed before us. He submitted that the ld. TPO in the transfer pricing adjustment on verification of all these workings enclosed in the TP study report together with the written submissions filed by the assessee, had accepted the arm's length pricing of entire transactions of Rudrapur unit and did not make any adjustment to ALP thereon. He argued that the order of the ld. TPO is binding on the ld. AO and accordingly, the ld. AO is not justified in making further adjustments to the claim of deduction u/s.80IC of the Act. He also argued that in earlier years, the department had made partial disallowance u/s.80IC of the Act for Rudrapur unit based on specific finding that the said unit had made excessive profits and transfer of components to Rudrapur unit from other unit was not

done at arm's length. It was also observed that in earlier years, the provisions of Section 80IA(8) and Section 80IA(10) were not complied with. However, in the current financial year relevant to A.Y.2013-14, there was no such finding recorded by the ld. AO. Hence, the order of the ld. TPO making no adjustment to ALP in respect of specified domestic transaction of Rudrapur unit would be binding on the ld. AO and the claim of deduction u/s.80IC of the Act by the assessee for Rudrapur unit need to be accepted in toto. He also argued that similar claim of deduction u/s.80IC of the Act for Rudrapur Unit made by the assessee were accepted as such in A.Yrs.2007-08 and 2008-09 before it was disturbed in A.Y.2009-10 as stated supra. He submitted that in A.Y.2009-10, this Tribunal in assessee's own case in ITA No.1956/Mum/2014 dated 10/04/2019 had restored the matter back to the file of the ld. AO to recompute the deduction with specific directions after primarily accepting the method of computation of eligible profits followed by the assessee. He drew our attention to the paras 55 to 59 of the said Tribunal order for A.Y.2009-10 wherein in Para 55, the Tribunal has rejected DRP's action of questioning employee cost and power cost of Rudrapur unit; sales pricing of various models/variants sold by Rudrapur unit; wherein in Para 57, it has directed the ld. AO to examine the details on record as regards inter-unit pricing; wherein in Para 58, it has directed the ld. AO to examine the issue of non-allocation of certain R & D expenses to the Rudrapur unit and also non-allocation of other items of revenue expenditure to the Rudrapur unit in the light of the explanation offered by the assessee. He argued that there was no adverse finding recorded either by the ld. AO / ld. TPO / ld. DRP during the year under appeal and hence, the finding of this Tribunal in A.Y.2009-10 cannot be made applicable to the year under appeal.

19.4. Per contra, the ld. DR submitted that this issue should be remitted back to the file of the ld. AO in light of order of this Tribunal in assessee's own case for A.Y.2009-10 referred to supra.

19.5. We have heard rival submissions and perused the materials available on record. From the detailed facts narrated above and from the various arguments advanced by both the sides, we are of the considered opinion that for the year under appeal, the decision rendered by this Tribunal for A.Y.2009-10 cannot be made applicable in as much as there is absolutely no adverse finding at all by the lower authorities as was done in A.Y.2009-10. With regard to assessing profits that were disclosed by the assessee for Rudrapur unit, it is not in dispute that the assessee for the year under appeal had duly submitted his audit report in form 10CCB for claim of deduction u/s.80IC of the Act for Rudrapur unit alongwith computation of income, profit and loss account and balance sheet including the workings for allocation of expenditure for arriving at the profitability of Rudrapur Unit. It is not in dispute that the transactions reflected in Rudrapur Unit were subject matter of transfer pricing assessment under the category of 'specified domestic transactions' in terms of Section 92BA(v) of the Act and the ld. TPO had accepted the entire profitability disclosed in Rudrapur unit to be at arm's length in his transfer pricing order dated 31/10/2016. We find that in terms of Section 92CA(4) of the Act, the order of the ld. TPO is binding on the ld. AO. This fact has further been strengthened by CBDT instruction No.3/2016. We find for A.Y.2009-10, reference to Transfer Pricing Officer under the category of specified domestic transactions, were not provided for in the statute at the relevant point of time. Whereas for A.Y.2013-14 i.e. the year under appeal, the statute had duly provided for determining of arm's length price in respect of specified domestic transactions. It is not in dispute that the transactions of Rudrapur Unit duly fall within the ambit of

"specified domestic transactions". Hence, we hold that once the profitability disclosed by the assessee for Rudrapur unit had been accepted to be at arm's length by the ld. TPO in the transfer pricing adjustment, the same cannot be further disturbed by the ld. AO by making some disallowance or by adopting different method of determining the profitability and especially in view of the fact that no adverse findings were recorded by the lower authorities, with regard to profitability of Rudrapur Unit. In view of the aforesaid findings, we direct the ld. AO to accept the claim of deduction u/s.80IC of the Act made by the assessee in the return of income. Accordingly, the concise ground No.17 raised by the assessee is allowed.

20. In the result, appeal of the assessee in ITA No.7382/Mum/2017 for A.Y.2013-14 is partly allowed for statistical purposes.

SA No.461/Mum/2019 (A.Y.2013-14)

21. Since the main appeal is decided, the stay petition preferred by the assessee in SA No.461/Mum/2019 is hereby dismissed as infructuous.

ITA No.1449/Mum/2016 (Assessee appeal) A.Y.2011-12

22. The concise grounds 1-8 raised by the assessee for A.Y.2011-12 are exactly similar to concise grounds No.1-8 raised for A.Y.2013-14 in ITA No.7382/Mum/2017. The decision rendered for A.Y.2013-14 would apply with equal force for A.Y.2011-12 also except with variance in figures. The Ld. AO is directed to suitably replace the figures based on the facts provided by the assessee in the fact sheet before us. This direction is given for the sake of brevity and to avoid repetition and especially in view of the fact that the ld DR had not disputed the primary

facts and figures applicable for the Asst Year 2011-12 mentioned in the assessee's fact sheet filed before us.

23. The concise ground No.9 raised by the assessee for A.Y.2011-12 is with regard to disallowance of deduction u/s.80IC of the Act in respect of Rudrapur unit. We find that for A.Y.2011-12, the transaction of Rudrapur unit were not subjected to transfer pricing adjustment under the category (Specified Domestic Transactions) as the same was not provided in the statute. Hence, we deem it fit and appropriate to follow the directions given by this Tribunal for A.Y.2009-10 in ITA No.1956/Mum/2014 dated 10/04/2019 vide para 55-59 thereon. Accordingly, the concise ground No.9 raised by the assessee is allowed for statistical purposes.

24. The concise ground No.10 is with regard to long term capital loss of Rs.27,25,59,579/- on account of capital reduction in Mahindra Shubhlabh Services Ltd.,

24.1. We have heard rival submissions and perused the materials available on record. We find that the lower authorities had not accepted the claim of the assessee for determination and carry forward of long term capital loss in respect of shares held in Mahindra Shubhlabh Services Ltd., arising upon reduction in share capital by that company. We find that as per Section 47(iv) and Section 47 (v) of the Act, the transactions between holding company and subsidiary company are not regarded as transfer for the purpose of computation of capital gains. We find that the lower authorities had not allowed the loss by placing reliance on the decision of the Special Bench of Mumbai Tribunal in the case of Bennett and Coleman Co. Ltd., in ITA No.3013/Mum/2007 reported in 14 Taxmann.com 1 dated 30/09/2011 wherein it was held that capital loss on reduction of share capital cannot be allowed. We find that the ld. DRP

erred in holding that requisite evidence was not available during the hearing to substantiate that Mahindra Shubhlabh Services Ltd., is not a wholly owned subsidiary of assessee company. The ld. AR submitted that assessee holds 83.05% shares in Mahindra Shubhlabh Services Ltd., which was duly substantiated before the ld. DRP by drawing reference to page No.167 of the paper book which is part of annual accounts. We find that reduction of share capital had taken place in paid up value of equity shares in terms of Section 100 of Companies Act 1956. We find that there was extinguishment of the rights of the assessee and hence, this reduction has resulted into a capital loss in the hands of the shareholder i.e. assessee company.

24.2. In this regard, it would be relevant to address the primary undisputed facts before us. We find that the assessee had held 24681437 shares of Rs.10/- each in Mahindra Shubhlabh Services Ltd., The Hon'ble Bombay High Court approved the scheme of capital reduction on 25/03/2011 in terms of which, the number of shares post reduction was 9089448/- of Rs.10/- resulting in cancellation of remaining 15591989 shares. We find that the workings for determination of capital loss in this regard are enclosed in page 465 of the paper book filed before us. We find that the assessee received no consideration of reduction of share capital. We find that the ld. AR placed reliance on the decision of Bangalore Tribunal in the case of Jupiter Capital Pvt. Ltd., in ITA No.445/Bang/2018 dated 29/11/2018 in support of the proposition that reduction in share capital amounts to transfer of capital asset u/s.2(47) of the Act and accordingly pleaded that capital loss arising on account of share capital could be allowed to be carried forward in the hands of the assessee. We find that the Bangalore Tribunal had placed reliance on the Hon'ble Supreme Court in the case of Kartikeya vs. Sarabhai vs CIT reported in 228 ITR 163. On perusal of the facts before the Hon'ble

Supreme Court in Kartikeya vs. Sarabhai case, we find that assessee had purchased 90 non-cumulative preference shares in Sarabhai Ltd., each of the face value of Rs.1000/- at a price of Rs.420 per share. In the year 1965, a sum of Rs.500 per share was paid off to the shareholder upon reduction of share capital, which was effected by reducing the face value of each share from Rs.1000 to Rs.500/- and by paying of Rs.500 in cash. As a result thereof, the assessee became a holder in respect of 90 preference shares of value of Rs.500 per share, in place of being the holder of shares of the face value of Rs.1000/- per share. Subsequently, in the year 1966, Sarabhai Ltd., by virtue of s special resolution resolved to reduce liability of preference shares from Rs.500 per share to Rs.50 per share by paying off in cash a sum of Rs.450/- per share. Thus, the share held by the assessee which was originally of the face value of Rs.1000/- became a share of face value of Rs.50/- only. Thus, the capital reduction had taken place in two stages, firstly, when the face value was reduced from 1000 to 500 per share and secondly, when the face value was reduced from Rs.5000/- per share to Rs.50/- per share. The Assessing Officer in that case held that a sum of Rs.450/- per share which was received by the assessee in 1966 was subject to capital gains. However, the assessee contended in that case that that such reduction of the face value did not result in "transfer" as per the provisions of Section 2(47) of the Act. In this regard, the Hon'ble Supreme Court held as under:-

> *"10. Section 2(47) which is an inclusive definition, inter alia, provides that retinquishment of an asset or extinguishment of any right therein amounts to a transfer of a capital asset. While, it is no doubt true that the appellant continues to remain a shareholder of the company even with the reduction of a share capital, it is not possible to accept the contention that there has been no extinguishment of any part of his right as a shareholder qua the company. It is not necessary that for a capital gain to arise there must be a sale of a capital asset. Sale is only one of the modes of transfer envisaged by section 2(47). Relinquishment of the asset or the extinguishment of any right in it, which may not amount to sale, can also be considered as a*

transfer and any profit or gain which arises from the transfer of a capital asset is liable to be taxed under section 45.

11. When as a result of the reducing of the face value of the share, the share capital is reduced, the right of the preference shareholder to the dividend or his share capital and the right to share in the distribution of the net assets upon liquidation is extinguished proportionately to the extent of reduction in the capital. Whereas the appellant had a right to dividend on a capital of Rs. 500 per share, that stood reduced to his receiving dividend on Rs. 50 per share. Similarly, if the liquidation was to take place whereas he originally had a right to Rs. 500 per share, now his right stood reduced to receiving Rs. 50 per share only. Even though the appellant continues to remain a shareholder, his right as a holder of those shares clearly stands reduced with the reduction in the share capital.

12. The Gujarat High Court had in another case as Anarkali Sarabhai v. CIT [1982] 138 ITR 437 followed the judgment under appeal. That was a case where there had been redemption of preference share capital by the company and money was paid to the shareholders. It was held therein that difference between the face value received by the shareholder and the price paid for preference share was exigible to capital gains tax. In coming to this conclusion, the Gujarat High Court had followed the judgment under appeal in the present case.

13. The aforesaid decision of the Gujarat High Court in Anarkali Sarabhai's case (supra) was challenged and this Court in the Anarkali Sarabhaiv. CIT [1997] 224 ITR 422 upheld the High Court's decision. It had been contended in Anarkali Sarabhai's case (supra) on behalf of the assessee that reduction of preference share was not a sale or relinquishment of asset and, therefore, no capital gains tax was payable. Repelling this contention, this Court considered the definition of word 'transfer' occurring in section 2(47) and reading the same along with section 45, it came to the conclusion that when a preference share is redeemed by a company, what the shareholder does in effect is to sell the share to the company. The company redeems its preference shares only by paying the preference shareholders the value of the shares and taking back the preference shares. It was observed that in effect the company buys back the preference shares from the shareholders. Further, referring to the provisions of the Companies Act, it held that the reduction of preference shares by a company was a sale and would squarely come within the phrase 'sale, exchange or relinquishment[1] of an asset under section 2(47). It was also held that the definition of word 'transfer' under section 2(47) was not an exhaustive definition and that sub-section (1) of clause (47) of section 2 implies that parting with any capital asset for gain would be taxable under section 45 of the Act. In this connection, it was noted that when preference shares are redeemed by the company, the shareholder

has to abandon or surrender the shares in order to get the amount of money in lieu thereof.

14. In our opinion, the aforesaid decision of this Court in Anarkali Sarabhai's case (supra) is applicable in the instant case. The only difference in the present case and Anarkali Sarabhai's case (supra) is that whereas in Anarkali Sarabhai's case (supra), preference shares were redeemed in entirety, in the present case there has been a reduction in the share capital inasmuch as the company had redeemed its preference share of Rs. 500 to the extent of Rs. 450 per share. The liability of the company in respect of the preference share which was previously to the extent of Rs. 500 now stood reduced to Rs. 50 per share."

24.3. From the aforesaid facts before the Hon'ble Supreme Court and the decision rendered thereon, it could be seen and there was payment of cash consideration to the existing shareholder pursuant to reduction of share capital, whereas in the instant case, there is absolutely no dispute that the assessee company i.e. Mahindra and Mahindra Ltd., received no consideration on reduction of capital. Hence, the decision relied on the Hon'ble Supreme Court in Kartikeya Sarabhai supra by the Coordinate Bench of Bangalore Tribunal in the case of Jupiter Capital supra is factually distinguishable with that of the assessee herein. We find that in the facts before the Hon'ble Special Bench of Mumbai Tribunal referred supra, there was no receipt of consideration. Needless to mention that the Special Bench decision would have binding precedent over the Division Bench decision. We find that the ld. DRP had followed the aforesaid Special Bench decision which are applicable to the facts of the instant case as narrated hereinabove, on which we do not find any infirmity. No arguments were advanced before us to distinguish the said Special Bench decision either on facts or on law. Hence, we do not deem it fit to interfere in the order of the ld. DRP in this regard. Accordingly, the concise ground No.10 raised by the assessee is dismissed.

25. The concise ground No.11 raised by the assessee was stated to be not pressed and accordingly, the same is dismissed as not pressed.

26. We find that the assessee company had raised an additional ground for non-taxability of interest on tax free bonds in the sum of Rs.3,47,19,107 for computation of income for both under normal provisions of the Act as well as in computation of profits u/s.115JB of the Act.

26.1. We have heard rival submissions and perused the materials available on record. At the outset, we find that this additional ground deserves to be admitted as it does not involve verification of the primary facts on record and more especially in view of the undisputed fact that the entire details of interest income had been duly filed before the ld. AO by the assessee during the course of assessment proceedings. Admittedly, the said interest income included interest earned on tax free bonds in the sum of Rs.3,47,19,107/- which is not liable for taxation at all both under normal provisions of the Act as well as in the computation of book profits u/s.115JB of the Act. Merely because, the assessee had erroneously offered the same in the return of income, the same cannot be brought to tax by the revenue. The law is now well settled that only just and right tax should be collected from the right person by the revenue. Hence, we deem it fit and admit the additional ground and direct the ld. AO to reduce the sum of Rs.3,47,19,107/- towards interest income on tax free bonds both under normal provisions of the Act as well as in the computation of book profits u/s.115JB of the Act. We also place reliance on the decision of Hon'ble Jurisdictional High Court in the case of Pruthvi Brokers and Shareholders Pvt. Ltd., reported in 349 ITR 336 (Bom) in support of the proposition. Accordingly, the additional ground No.2 raised by the assessee is allowed.

27. In the result, the appeal of the assessee in ITA No.1449/Mum/2016 for A.Y.2011-12 is partly allowed for statistical purposes.

SA No.462/Mum/2019 (A.Y.2011-12)

28. Since the main appeal is decided, the stay petition preferred by the assessee in SA No.462/Mum/2019 is hereby dismissed as infructuous.

ITA No.1797/Mum/2016 (A.Y.2011-12) – Revenue Appeal

29. The only issue to be decided in this appeal is as to whether the ld. DRP was justified in holding that the dealer incentive paid by the assessee does not fall within the ambit of provisions of Section 194H of the Act and consequently, no disallowance u/s.40(a)(ia) of the Act could be made thereon.

29.1. We have heard rival submissions and perused the materials available on record. We find that during the course of assessment proceeding, a query was raised by the ld. AO about the applicability of TDS provisions to the dealer incentives and service coupon reimbursed to the dealers. The assessee responded that basically there must be a relationship of a service provider and the service receiver pursuant to which payment is made by the receiver to the provider in order to attract the provisions of Section 194H of the Act. The assessee explained that it sells vehicles to the dealers as its customers and not as agent within the meaning of Section 194H of the Act. It was explained categorically that the transaction with the dealer is of a sale and when the vehicles are sold to the dealer, ownership of the vehicle is transferred to the dealer and the dealer further sells the vehicle to the ultimate customer. The vehicle sold

by the dealer to the customer is owned by the dealer before it is sold and the sale executed by the dealer is not on behalf of the assessee company. The said sale transaction attracts sales tax under relevant sales tax laws. Dealer does not render any service to the company which could be said to be in the course of buying or selling of vehicles. In order to encourage dealer from buying more vehicles from the company, dealer incentive is paid to the dealers on the basis of number of vehicles purchased by them. This incentive is therefore, really in the nature of volume discount as it is known in the regular trade parlance. Those incentives paid to the dealers are in the nature of discount in purchase price and not in the form of commission for selling assessee company's vehicles. The assessee also submitted with evidence that it records the sale of vehicles in its books as and when the vehicles are sold to the dealer. Once, the vehicle is sold to the dealer, the dealer becomes a debtor to the assessee company and the payment thereon is not linked to further sale by the dealer to the ultimate customer. It was also specifically pointed out that there is no provision for return of unsold vehicles by the dealer to the assessee company. Thus, the relationship of principal and agent does not exist between the company and dealer. Since the dealer does not render any services to the company, in lieu of incentives received by them, the question of deduction of tax at source on the said payment within the ambit of Section 194H of the Act does not arise. We find that the ld. AO however, did not agree to the said proposition of the assessee and concluded that the dealer has rendered services in the course of buying and selling of vehicles by acting in the capacity of agent and that there is no difference between the term "discount" and "commission". With these observations, the ld. AO concluded that the said payment would fall within the ambit of Section 194H of the Act warranting deduction of tax at source, for which there would be disallowance u/s.40(a)(ia) of the Act was made in the assessment. We find that this issue has already been

decided in favour of the assessee for A.Y.2008-09 by this Tribunal and against that order, the revenue had preferred an appeal before the Hon'ble Jurisdictional High Court. The Hon'ble Jurisdictional High Court vide its order dated 06/02/2017 in ITA No. 1148/Mum/2014 had dismissed the appeal of the revenue. Further the Special Leave Petition (SLP) preferred by the revenue before the Hon'ble Supreme Court was also dismissed vide SLP No.37462/17 dated 12/01/2018. Hence, respectfully following the aforesaid decision, the appeal filed by the revenue of A.Y.2011-12 deserves to be dismissed and is hereby dismissed.

ITA No.719/Mum/2017 (A.Y.2012-13) Assessee Appeal

30. The concise grounds 1-11 raised by the assessee for A.Y.2012-13 are exactly similar to concise grounds No.1-11 raised for A.Y.2013-14 in ITA No.7382/Mum/2017. The decision rendered for A.Y.2013-14 would apply with equal force for A.Y.2012-13 also except with variance in figures. The Ld. AO is directed to suitably replace the figures based on the facts provided by the assessee in the fact sheet before us. This direction is given for the sake of brevity and to avoid repetition and especially in view of the fact that the ld DR had not disputed the primary facts and figures applicable for the Asst Year 2012-13 mentioned in the assessee's fact sheet filed before us.

31. The concise ground No.12 raised by the assessee for A.Y.2012-13 is exactly similar to concise ground No.9 raised by the assessee for A.Y.2011-12 and the decision rendered thereon would apply with equal force for A.Y.2012-13 also except with variance in figures.

32. The concise ground No.13 raised by the assessee for A.Y.2012-13 is exactly similar to concise ground No.10 raised by the assessee for

A.Y.2011-12 and the decision rendered there on would apply with equal force for A.Y.2012-13 also except with variance in figures.

33. The concise ground No.14 raised by the assessee for A.Y.2012-13 together with additional ground No.1 raised by the assessee vide letter dated 27/08/2019 is exactly similar to concise ground No.12 raised by the assessee for A.Y.2013-14 and the decision rendered thereon would apply with equal force for A.Y.2012-13 also except with variance in figures.

34. The concise ground No.15 raised by the assessee is with regard to seeking benefit of set off of brought forward loss and unabsorbed depreciation relating to demerged business of Mahindra Automobile Distributor Pvt. Ltd. (MADPL).

34.1. We have heard rival submissions and perused the materials available on record. We find that assessee company had claimed set off of brought forward loss and unabsorbed depreciation relating to demerged business of MADPL amounting to Rs.519.54 Crores in the return of income. However, the ld. AO had allowed the said benefit to the extent of Rs.411.41 Crores based on the assessed loss of MADPL. We find that MADPL is in appeal for differential amount of loss of Rs.108.13 Crores. In case if MADPL succeeds in appeal and becomes entitled to the full or part loss of Rs.108.13 Crores then, correspondingly, the availability of business loss and unabsorbed depreciation loss in the hands of the assessee company for set off would also increase. Hence, in the interest of justice and fair play, we deem it fit and appropriate to give the direction to the ld. AO to modify the assessment order and allow the loss to the assessee company as consequential effect consequent to determination of final loss of MADPL. Accordingly, the concise ground No.15 for A.Y.12-13 is allowed for statistical purposes.

35. The concise ground No.16 raised by the assessee is with regard to seeking proper credit for TDS, TCS and foreign tax.

35.1. We have heard rival submissions and perused the materials available on record. From the grounds of the assessee we find that assessee is seeking credit for TDS of Rs.7,59,98,107/-, credit for TCS of Rs.8,33,496/- and foreign tax credit of Rs.4,35,96,968/-. The ld. AO is hereby directed to verify the said claim and allow credit appropriately for A.Y.2012-13. Accordingly, the concise ground No.16 raised by the assessee is allowed for statistical purposes.

36. We find that assessee had raised additional ground No.2 seeking exemption from taxability in respect of interest on tax free bonds amounting to Rs.4,47,57,189/-. This additional ground No.12 is exactly similar to additional ground No.2 raised by the assessee for A.Y.2011-12 and the decision rendered thereon would apply with equal force for A.Y.2012-13 also except with variance in figures.

37. In the result, appeal of the assessee in ITA No.719/Mum/2017 for A.Y.2012-13 is partly allowed for statistical purposes.

38. It is pertinent to mention here that this order is pronounced after a period of 90 days from the date of conclusion of the hearing. In this regard, we place reliance on the decision of co-ordinate bench of this Tribunal in the case of JSW Ltd in ITA Nos. 6264 & 6103/Mum/2018 dated 14.5.2020, wherein this issue has been addressed in detail allowing time to pronounce the order beyond 90 days from the date of conclusion of hearing by excluding the days for which the lockdown announced by

the Government was in force. The relevant observations of this tribunal in the said binding precedent are as under:-

> *7. However, before we part with the matter, we must deal with one procedural issue as well. While hearing of these appeals was concluded on 7th January 2020, this order thereon is being pronounced today on 14th day of May, 2020, much after the expiry of 90 days from the date of conclusion of hearing. We are also alive to the fact that rule 34(5) of the Income Tax Appellate Tribunal Rules 1963, which deals with pronouncement of orders, provides as follows:*
>
> *(5) The pronouncement may be in any of the following manners :—*
>
> *(a) The Bench may pronounce the order immediately upon the conclusion of the hearing.*
>
> *(b) In case where the order is not pronounced immediately on the conclusion of the hearing, the Bench shall give a date for pronouncement.*
>
> *(c) In a case where no date of pronouncement is given by the Bench, every endeavour shall be made by the Bench to pronounce the order within 60 days from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of exceptional and extraordinary circumstances of the case, the Bench shall fix a future day for pronouncement of the order, and such date shall not **ordinarily** (emphasis supplied by us now) be a day beyond a further period of 30 days and due notice of the day so fixed shall be given on the notice board.*
>
> *8. Quite clearly, "ordinarily" the order on an appeal should be pronounced by the bench within no more than 90 days from the date of concluding the hearing. It is, however, important to note that the expression "ordinarily" has been used in the said rule itself. This rule was inserted as a result of directions of Hon'ble jurisdictional High Court in the case of **Shivsagar Veg Restaurant Vs ACIT [(2009) 317 ITR 433 (Bom)]** wherein Their Lordships had, inter alia, directed that "**We, therefore, direct the President of the Appellate Tribunal to frame and lay down the guidelines in the similar lines as are laid down by the Apex Court in the case of Anil Raj (supra) and to issue appropriate administrative directions to all the benches of the Tribunal in that behalf. We hope and trust that suitable guidelines shall be framed and issued by the President of the Appellate Tribunal within shortest reasonable time and followed strictly by all the Benches of the Tribunal. In the meanwhile (**emphasis, by underlining, supplied by us now**), all the revisional and appellate authorities under the Income-tax Act are directed to decide matters heard by them within a period of three months from the***

date case is closed for judgment*". In the ruled so framed, as a result of these directions, the expression "ordinarily" has been inserted in the requirement to pronounce the order within a period of 90 days. The question then arises whether the passing of this order, beyond ninety days, was necessitated by any "extraordinary" circumstances.*

*9. Let us in this light revert to the prevailing situation in the country. On 24th March, 2020, Hon'ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of Covid 19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the functioning of the Income Tax Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and on account of strict enforcement of health advisories with a view of checking spread of Covid 19. The epidemic situation in Mumbai being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial wok all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that Hon'ble Supreme Court of India, in an unprecedented order in the history of India and vide order dated 6.5.2020 read with order dated 23.3.2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that "**In case the limitation has expired after 15.03.2020 then the period from 15.03.2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown***". Hon'ble Bombay High Court, in an order dated 15th April 2020, has, besides extending the validity of all interim orders, has also observed that, "**It is also clarified that while calculating time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly***", and also observed that "**arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020***". It has been an unprecedented situation not only in India but all over the world. Government of India has, vide notification dated 19th February 2020, taken the stand that, the coronavirus "should be considered a case of natural calamity and FMC (i.e.* ***force majeure*** *clause) maybe invoked, wherever considered appropriate, following the due procedure…". The term '****force majeure'*** *has been defined in Black's Law Dictionary, as '****an event or effect that can be neither anticipated nor controlled****' When such is the position, and it is officially so notified by the Government of India and the Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force*

can be anything but an "ordinary" period.

10.In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire country was in lockdown, we should compute the period of 90 days by excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of ***Otters Club Vs DIT [(2017) 392 ITR 244 (Bom)]****, Hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that directed "****while calculating the time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly****". The extraordinary steps taken suo motu by Hon'ble jurisdictional High Court and Hon'ble Supreme Court also indicate that this period of lockdown cannot be treated as an ordinary period during which the normal time limits are to remain in force. In our considered view, even without the words "ordinarily", in the light of the above analysis of the legal position, the period during which lockout was in force is to excluded for the purpose of time limits set out in rule 34(5) of the Appellate Tribunal Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days, clearly comes into play in the present case. Of course, there is no, and there cannot be any, bar on the discretion of the benches to refix the matters for clarifications because of considerable time lag between the point of time when the hearing is concluded and the point of time when the order thereon is being finalized, but then, in our considered view, no such exercise was required to be carried out on the facts of this case.*

11. To sum up, the appeal of the assessee is allowed, and appeal of the Assessing Officer is dismissed. Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the notice board.

38.1. Respectfully following the aforesaid judicial precedent, we proceed to pronounce this order beyond a period of 90 days from the date of conclusion of hearing.

TO SUM UP:

39. In the result, all the appeals of the assessee are partly allowed for statistical purposes and appeal of the revenue is dismissed.

Order pronounced as per Rule 34(5) of ITAT Rules and by placing the pronouncement list in the notice board on 19/06/2020.

Sd/-	**Sd/-**
(MAHAVIR SINGH)	**(M.BALAGANESH)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

Mumbai; Dated 19/06/2020
KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai